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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 772

JOHN E. ALDRIDGE AND MARVIN WOOTEN,
PETITIONERS

VERSUS

GRODELIA CARR, FANNIE HOOKS,
VERA WALKER, CORA H. PEARS
MARY LESSIE IRVING AND ESTER STEGALL,
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE U. S. COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No._____

GROZELIA CARR, FANNIE MOORE,
VERA WALKER, CODA M. FEARS
MARY LESSIE EWING and ESTER STEGALL,
Plaintiffs-Appellees,

versus

MONROE MANUFACTURING COMPANY,
Defendant,
JOHN E. ALDRIDGE and MARVIN WOOTEN
Defendants-Appellants.

PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI

John E. Aldridge and Marvin Wooten, defendants-appellants, by their counsel, petition the United States Supreme Court, pursuant to 28 U.S.C. 1254 and Supreme Court Rules, 19, 21, and 23, for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, to review the judgment of the said Court of Appeals entered on August 18, 1970, in the above-styled cause, being Cause No. 28,397 in the Court of Appeals, on the grounds and for the reasons hereinafter set forth.

I

INTRODUCTION

This case was appealed to the United States Court of Appeals for the Fifth Circuit from an order of the United States District Court for the Northern District of Mississippi, Eastern Division, dated June 4, 1969 (not reported) (see Appendix E herein, pp. 31-32), which denied the motion of defendants-appellants Aldridge and Wooten (Appendix D, pp. 29-30) to block out identifying names and addresses on work application cards which the District Court had ordered them to produce (Appendix C, pp. 26-28) to the plaintiffs and their attorneys for inspection and copying. The opinion by the United States Court of Appeals for the Fifth Circuit (Appendix F, pp. 33-57) was rendered on August 18, 1970, ... F.2d .....

II

GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit which is sought to be reviewed was dated August 18, 1970, and was entered on the same date. It is believed that 28 U.S.C. 1254 confers on this Court jurisdiction to review said judgment by writ of certiorari, and said jurisdiction is invoked because of the following special and important reasons:

1. The decision of the Court of Appeals is in conflict with its own decisions and decisions of other Court of Appeals on the same matters.

2. The Court of Appeals in its decision of August 18,

1970, decided an important state question in a way in conflict with applicable state law.

3. The Court of Appeals decided an important question of Federal law which has not been, but should be, settled by this Court.

4. The Court of Appeals decided a Federal question (Aldridge and Wooten's Fifth Amendment rights against compulsory self-incrimination) in a way in conflict with applicable decisions of this Court.

III
QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court err in denying the defendants-appellants' motion for permission to block out on the work application cards which the District Court ordered them to produce to the plaintiffs and their attorneys for inspection and copying the identities of employers and applicants not parties to the suit?

2. Does the District Court's order requiring the defendants-appellants to produce this identifying information, which the state statute prohibits them from disclosing upon penalty of fine and imprisonment, violate the defendants-appellants' constitutional rights under the Fifth Amendment to the United States Constitution against compulsory self-incrimination?

3. Does the District Court's order requiring disclosure of the privileged information in this case, in the absence of any immunity provided by state or Federal statute, immune or protect the defendants-appellants from prosecution and conviction in the state courts under the penalty provisions of the state statue?

4. Does the District Court's order unlawfully and unconstitutionally violate and set aside important state public policy essential to the successful administration of the state's employment service program?

5. Does the District Court's order violate the constitutional rights of non-party applicants and non-party employers who are without notice or opportunity to be heard in defense of their rights of non-disclosure granted them by the state statute?

6. Is the District Court's order contrary to the provisions of Rules 26 and 34 of the Federal Rules of Civil Procedure which authorize the Court to order the production and copying only of documents "not privileged"?

7. Is the state privilege statute which forbids the disclosure of identifying information, except to the extent necessary for proper administration of the state employment security act, in violation of any provision of the United States Constitution or any Federal statute or any right granted by Federal statute?

IV

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

1. Section 2(a), Mississippi Employment Security Law (Section 7369, Mississippi Code of 1942, Annotated) (Appendix A, p. ~~22~~ 26).

2. Section 11(g), Mississippi Employment Security Law (Sections 7411 and 7412, Mississippi Code of 1942, Annotated) (Appendix A, pp. ~~22-25~~ 26-28).

3. Section 12(a), Mississippi Employment Security

Law (Section 7419, Mississippi Code of 1942, Annotated) (Appendix A, p. 23).

4. Section 11(f), Mississippi Employment Security Law (Section 7410, Mississippi Code of 1942, Annotated) (Appendix A, p. 26).

5. Section 4(a), Mississippi Employment Security Law (Section 7378, Mississippi Code of 1942, Annotated) (Appendix A, p. 24).

6. Section 708, Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-7) (Appendix A, p. 24).

7. Section 709(c), Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-8(c)) (Appendix A, p. 24).

8. Article 3, Section 26, Mississippi Constitution (Volume 1, Mississippi Code of 1942, Annotated) (Appendix A, p. 24).

9. Amendment V, United States Constitution (Appendix A, p. 24).

V

STATEMENT OF THE CASE

The defendant-appellant John E. Aldridge is Executive Director of the Mississippi Employment Security Commission (hereinafter called MESC), which administers the Mississippi Employment Security Law (Section 7388, et seq., Mississippi Code of 1942, Annotated) in the State of Mississippi. This includes the state unemployment insurance program and the Mississippi state employment service. The MESC operates through a state administrative office in Jackson and 33 local offices,

one of which is located at Aberdeen. The defendant-appellant Marvin Wooten is manager of the MESC Aberdeen local office.

The suit out of which this appeal arose was brought in the United States District Court for the Northern District of Mississippi, Eastern Division, by the plaintiffs-appellees, a group of six Negro women, against Monroe Manufacturing Company (now Conoco Products, Inc.), Aberdeen, Mississippi (hereinafter called Conoco), and against John E. Aldridge and Marvin Wooten, as officers of MESC, and suit being filed under Title 42 U.S.C. Section 2000e-5, and Title 28 U.S.C. Section 1343. Plaintiffs-appellees Carr, et al., asked for class relief pursuant to Rule 23 of the Federal Rules of Civil Procedure "on their own behalf and on behalf of all Negroes who have applied and will apply through Defendant MESC for emploment at Defendant Conoco, who have sought and will seek to be classified by Defendant MESC for referral to Defendant Conoco, and who have sought and will seek to be referred by Defendant MESC to Defendant Conoco."

In addition to other relief not pertinent here, the plaintiffs-appellees Carr, et al., prayed that the Court:

> "Grant plaintiffs and the members of their class a preliminary and permanent injunction enjoining defendants Aldridge and Wooten, their agents, successors, employees and those acting in concert with them, from discriminating on the grounds of race against Negroes who apply through defendant MESC for employment at defendant Conoco, who seek to be classified for referral to defendant Company and who seek to be referred by defendant MESC to defendant Company."

Plaintiffs-appellees Carr, et al., moved the District Court under Rule 34 of the Federal Rules of Civil Procedure for an order requiring the MESC defendants-appellants Aldridge and Wooten to produce and permit plaintiffs-appellees Carr, et al., their representatives and attorneys, to inspect and copy certain MESC records, including Forms MSES 511, Application Card (Appendix B, p. 31-32), on each applicant or registrant with the MESC Aberdeen office. After hearing, the District Court ordered (Appendix C, pp. 26-28) the said defendants-appellants Aldridge and Wooten to produce and make available to plaintiffs-appellees Carr, et al., and their attorneys for inspection and copying, among other records, the Forms MSES 511, Application Card, for all MESC Aberdeen applicants who were active in MESC files during any period from July 2, 1965, to date, in which there was pending a "job order" in behalf of defendant Conoco. The defendants-appellants Aldridge and Wooten filed a motion (Appendix D, pp. 29-30) for re-hearing on privileged status of MESC records praying the District Court to amend its order so as to permit the defendants-appellants Aldridge and Wooten to block out on said application cards the names of employers other than defendant Conoco to whom the applicants were referred, and the names and addresses of applicants other than the six plaintiffs. The defendants-appellants Aldridge and Wooten filed this motion because of Section 11(g) of the Mississippi Employment Security Law (Appendix A, pp. 22-25), more particularly that portion thereof which reads as follows:

> "Information * * * obtained from any individual pursuant to the administration of this act, shall, except to the extent necessary for the proper administration of this act, be held confidential and shall not be published or be opened

to public inspection (other than to public employees in the performance of their public duties), in any manner revealing the individual's or employing unit's identity * * *. Any employee or member of the Board of Review or any employee of the commission, who violates any provision of this section, shall be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200.00), or imprisoned for not longer than ninety (90) days, or both."

The District Court on June 4, 1969, entered its order (Appendix E, pp. 61-62) denying the prayer of defendants-appellants Aldridge and Wooten for permission to block out the identifying names and addresses of non-parties on the application cards which the Court had ordered produced. From this order the defendants-appellants Aldridge and Wooten filed an appeal to the United States Court of Appeals for the Fifth Circuit. On August 18, 1970, the said Court of Appeals rendered its decision (Appendix F, pp. 63-76) affirming the order of the District Court. It is that decision of the Court of Appeals which the defendants-appellants Aldridge and Wooten desire to have this Court review on writ of certiorari.

VI
ARGUMENT

The defendants-appellants Aldridge and Wooten are not objecting to producing to the plaintiffs-appellees any of the information ordered by the District Court to be produced, which identifies only parties to the suit. They believe the records identifying the six plaintiffs and Conoco, parties to the suit, are essential to MESC's own defense of its proper administration of the act, and therefore come within the one and only exception con-

tained in the privilege statute ("except to the extent necessary for the proper administration of this act"). Their appeal [illegible] on the one question of their right, prohibited by the District Court, to block out the identifying names and addresses of non-party applicants and employers on the work application cards, MSES 511, which the District Court ordered them to produce.

The basic issue being litigated in this lawsuit in the District Court is whether or not the defendants Aldridge and Wooten and those MESC employees working under them have discriminated against the six plaintiffs and members of their class in classifying, selecting, and referring applicants for jobs at defendant Conoco, and whether or not the defendant Conoco has discriminated against them in hiring. That is, were these actions in classifying, selecting, referring, and hiring based upon qualifications regardless of race, or upon race regardless of qualifications. After deleting the names and addresses of non-party applicants and employers, each application card would still show all of the information bearing upon the above question. Each application card would still show the applicant's race, age, weight, height, education, training, work experience, test results, availability, any physical disabilities, how classified by MESC, and the record of all services rendered the applicant by MESC, including the date, type, and results of each referral for work. The cards would still show which applicants were referred to defendant Conoco, since only the names and addresses of non-party employers would be deleted. In other words, the cards would still show the race and qualifications of all applicants and would show which of those applicants were classified,, selected, and referred to Conoco.

With the names of non-party applicants and employers blocked out, it could thus be determined from the application cards whether or not the MESC classified all applicants properly, whether or not Negro applicants were classified any differently from white applicants, whether or not MESC selected and referred to defendant Conoco the best qualified applicants regardless of race, and whether or not defendant Conoco hired the best qualified regardless of race from among those so referred.

We respectfully submit that the decisions of the District Court and the Court of Appeals denying permission to block out this non-essential identifying information should be reviewed by this Court, for the following reasons:

1. *The decision of the Court of Appeals is in conflict with its own decisions and decisions of other Courts of Appeals on the same matters.*

In *Wirtz v. Continental Finance and Loan Co.*, 326 F.2d 561 (1964), the U.S. Court of Appeals for the Fifth Circuit held that:

> "there is a vital public interest in preserving the anonymity of employees who complain to the Government that their employer is paying substandard wages. The Government would have a virtually impossible task if it had to rely on its own policing activities to discover all violations of the wage and hour laws; it must therefore depend largely upon the employees themselves * * *.
>
> "The shield of anonymity is preferable to the sword of punishment.
>
> "Only by preserving their anonymity can the

> government obtain the information necessary to implement the law properly. *Wirtz v. B.A.C. Steel Products, Inc.*, 4th Cir., 312 F.2d 14."

In *Wirtz v. McDade*, 330 F.2d 619 (1964), the U. S. Court of Appeals for the Fifth Circuit reversed an order of the District Court and held that the Secretary of Labor was not required to produce at pretrial discovery statements taken by representatives of the Secretary.

In *Mitchell v. Roma*, 265 F.2d 633, the United States Court of Appeals for the Third Circuit denied the right of defendants to require discovery of the names of informers in a suit charging violations of the Fair Labor Standards Act. The Court said:

> "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement."

In *Arnstein v. United States*, 296 F. 946, the Court said:

> "While I think the information asked for comes within the meaning of privileged matter as that expression is used in Rule 26(b) I also believe that, even if that expression did not cover it the Court, upon the broad ground of public policy stated above whether or not strictly a privilege, should still refuse to order the disclosure asked for."

In *In Re Reid*, 155 F. 933, in which the Court upheld the privileged nature of a tax statement made privileged by a state statute, the Court said:

> "To permit that information to become public would defeat the plain purpose of the statute by

> deterring the taxpayer from revealing what frequently could not be learned from any other source * * *. The power of the Legislature to prevent these consequences is unquestionable. The wisdom and policy of the act must be conclusively assumed. Its meaning is unequivocal, and needs no construction. A like statute was sustained in *Boske v. Comingore*, 177 U.S. 459. The reasoning of that case upholds the views expressed above * * *. Apart from what has been said, it is clear, also, that the state statute is a rule of evidence which the courts of the United States will enforce. *Conn. Life Ins. Co. v. Union Trust Co.*, 112 U.S. 254."

In *In Re Valecia Condensed Milk Co.*, 240 F. 310, the United States Court of Appeals for the Seventh Circuit held that the Secretary of the Wisconsin Tax Commission was prohibited by state statute from responding to a subpoena duces tecum to produce certain state records. The Court said:

> "Without in any degree trenching upon the essential and full power of courts to compel the production of papers, we must recognize also the generally declared public policy against revealing such returns — made, as they are, under compulsion of law, for the particular purpose of taxation; a public policy repeatedly recognized by the courts. With an enactment such as the one in question, directed against the production of these returns, it is not lightly to be presumed that the public policy manifested by such statute was intended to be practically neutralized by the excepting words."

2. *The Court of Appeals decided an important state question in a way in conflict with applicable state law.*

Section 11(g) of the Mississippi Employment Security Law (Appendix A, pp. 25-28) establishes by state law an important state public policy against disclosure by Mississippi Employment Security Commission officers or employees of identifying informaton obtained by them except as necessary for the administration of the state act. The Court of Appeals' decision sets aside this important state policy contrary to and in conflict with the state law.

The Mississippi Legislature, in Section 2(a) of the Mississippi Employment Security Law (Appendix A, p. 22), set forth the "declaration of state public policy," this being to seek to ameliorate the ill effects of unemployment in the state by "the enactment of this measure, under the police powers of the state * * *."

In Section 12(a) of the Mississippi Employment Security Law (Appendix A, p. 28), the Legislature established the Mississippi State Employment Service in the MESC.

In Section 11(f) of the Mississippi Employment Security Law (Appendix A, p. 28), the Legislature charged the Commission, with the aid and advice of its advisory councils, to take all appropriate steps to reduce and to prevent unemployment.

In Section 4(a) of the Mississippi Employment Security Law (Appendix A, p. 24), the Legislature fixed as one of the eligibility requirements for the payment of unemployment benefits to an unemployed worker that "he has registered for work at and thereafter has continued to report to an employment office in accordance with such regulations as the commission may prescribe * * *."

In Section 11(g)(1) of the Mississippi Employment Security Law (Appendix A, p. 27), the Legislature said:

> "Information * * * obtained from any individual pursuant to the administration of this act, shall, except to the extent necessary for the proper administraion of his act, be held confidential and shall not be published or be opened to public inspection * * * *in any manner revealing the individual's or employing unit's identity* * * *. (Emphasis added)

It can readily be seen that in establishing the employment security program in the State the purpose of the program was to seek to alleviate the hazards of unemployment ("this greatest hazard of our economic life") by (1) establishing a system of free public employment offices charged with the responsibility of seeking to place the unemployed workers in suitable jobs and (2) establishing a system of unemployment insurance benefits payable to those for whom jobs are not available. The act requires employers to pay unemployment tax to finance the program and to be used for the payment of benefits to eligible unemployed persons, but it does not require employers to use the employment service or to accept referrals of unemployed workers or to cooperate in any way with the public employment service. The cooperation of employers, in the placing of their job orders with the employment service, the acceptance of referrals from the employment service, and giving the employment service information about their hiring practices, wage rates, job requirements, etc., is vital to the achievement of this phase of the State's public policy. Without such cooperation and use of the employment service by employers the administration of the act would be utterly impossible.

If the courts should begin to require the production and disclosure of the information obtained by MESC voluntarily from employers in the administration of the public employment service, in a manner identifying the employers, they would cease doing business with the state employment service and would discontinue giving to it the information required for administering the program. This would prevent the employment service from being able to place unemployed workers in jobs and would therefore be detrimental to unemployed workers, would result in the payment of more unemployment benefits thus causing a drain upon the fund established by employer taxes and would result in the increase of employer tax rates. It would defeat the entire purpose and the public policy established by the Legislature in setting up the program. It would also impair the confidence of applicants in giving to MESC the confidential personal information essential to success of the employment service program.

In *Boske v. Comingore*, 177 U.S. 459, 20 Sup. Ct. 701, 44 L.Ed. 846, the United States Supreme Court held that a collector of internal revenue was not required to produce certain records in a habeas corpus proceeding. The United States Supreme Court said:

> "The papers in question, copies of which were sought from the appellee, were the property of the United States, and were in his official custody under a regulation forbidding him to permit their use except for purposes relating to the collection of the revenues of the United States. *Reasons of public policy may well have suggested the necessity, in the interest of the government, of not allowing access to the records* in the offices of collectors of internal revenue, except as

> might be directed by the Secretary of the Treasury. The interests of persons compelled, under the revenue laws, to furnish information as to their private business affairs would often be seriously affected if the disclosures so made were not properly guarded." (Emphasis added)

The Court of Appeals' decision is in further conflict with state law as interpreted by the Mississippi Supreme Court, in that the Court of Appeals' decision requires the defendants-appellants Aldridge and Wooten to divulge identifying information the disclosure of which would subject them to a penalty under the state law.

In *Rawleigh v. Hester*, 190 Miss. 329, the Mississippi Supreme Court said:

> "*A person is not obligated to reveal anything in answer to a bill of discovery which may subject him to a forfeiture or penalty; he is excused from making discovery not only of that which must but even of that which may, subject him to to a penalty.* 23 Am. Jur. 2d 521. Also, Wood *Naval Stores v. Lattimer*,, 229 Miss. 197." (Emphasis added)

In *Retail Credit Company v. Garroway*, 240 Miss. 230, the Mississippi Supreme Court said:

> "*Discovery may not be required of privileged information; nor of matters which would impute a crime to the defendant or which would subject him to a penalty other than a statutory penalty.*" (Emphasis added)

3. *The Court of Appeals decided an important question of Federal law which has not been, but should be, settled by this court.*

The Court of Appeals held that the District Court has the authority to weigh the importance of the need for evidence in a Federal case against the state public policy of non-disclosure established by the State Employment Security Law, and to set aside the state public policy if the District Court so decides. This important question of Federal law has not been, but should be, settled by this Court.

4. *The Court of Appeals decided a Federal question (Aldridge's and Wooten's Fifth Amendment rights against compulsory self-incrimination) in a way in conflict with applicable decisions of this Court.*

The defendants-appellants Aldridge and Wooten believe that the District Court's order to produce the application cards on non-parties without blocking out the identifying names and addresses would compel them to violate the criminal provisions of the state privilege statute, and would result in irreparable injury to their important constitutional rights under the Fifth Amendof the United States Constitution against compulsory self-incrimination.

Section 11(g) of the Mississippi Employment Security Law (Appendix A, pp. [illegible]) states, "Any employee • • • of the commission, who violates any provision of this section, *shall be fined not less than twenty dollars ($20.00), nor more than two hundred dollars ($200.00), or imprisoned for not longer than ninety (90) days, or both.*" (Emphasis added) Prosecution for violation of the state act would be made in the state courts. Aldridge and Wooten have no assurance that the state courts would accept the District Court's order as a defense for their violation of the express provisions of the state act,

which act gives no immunity and allows no exception for disclosure in court proceedings, as do many state statutes. Aldridge and Wooten are afraid to assume this risk, and they believe that the United States and the Mississippi Constitutions give them the right not to be required to assume this risk.

It has been clearly established by the United States Supreme Court in a long series of decisions that the constitutional protection against compulsory self-incrimination prohibits a party or a witness being compelled in either a criminal or civil proceeding, to give evidence or to produce records which may eventuate in his being prosecuted for a criminal offense. The District Court's order has the effect of compelling Aldridge and Wooten to commit a criminal offense under the state statute by producing records containing identifying information obtained from non-parties to the lawsuit, and also has the effect of establishing in the public record of the lawsuit evidence of their having committed the offense. In the following line of decisions dating from 1886 down to 1966 this Court has clearly established and has repeatedly reaffirmed the doctrine that the Fifth Amendment to the United States Constitution prohibits a discovery that might tend to incriminate the party or witness, unless *by statute* the party or witness is given *absolute and positive immunity, amnesty, and indemnity from prosecution:*

Boyd v. United States, 116 U.S. 631 (1886)
Counselman v. Hitchcock, 142 U.S. 547 (1892)
Brown v. Walker, 161 U.S. 591 (1896)
Ballman v. Fagin, 200 U.S. 186 (1906)
Hale v. Henkel, 201 U.S. 43 (1906)
Arndstein v. McCarthy, 254 U.S. 71 (1920)

Gouled v. United States, 255 U.S. 298 (1921)
United States v. White, 322 U.S. 694 (1944)
Hoffman v. United States, 241 U.S. 479 (1951)
Ullmann v. United States, 350 U.S. 422 (1956)
Miranda v. Ariz., 384 U.S. 436 (1966)

In this series of cases the Court has established and repeated the principle that the Congress or a state legislature may not, even for a compelling public purpose, require a person to produce evidence that may result in his being incriminated or his property being subject to forfeiture, unless the statute gives absolute and positive immunity, amnesty, and indemnity from prosecution. We earnestly submit that if a statute enacted by the Federal Congress or a state legislature providing any less than absolute and positive immunity, amnesty, and indemnity from prosecution is not sufficient to meet the requirement of the Fifth Amendment, that the order of the District Court, lacking the authority of any immunity statute, does not provide the certain and positive immunity against prosecution which the Constitution requires.

In *Society Internationale v. Rogers*, 357 U.S. 197, the Supreme Court reversed decisions of the District Court and the Court of Appeals which had dismissed the suit because of plaintiff's failure to comply with the District Court's order to produce certain records. The Supreme Court said:

> "It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction. Of course, this situation should be distinguished from one where a party claims that compliance with a court order will reveal facts which may provide the basis for criminal

> prosecution of that party under the penal laws of a foreign sovereignty thereby shown to have been violated. *Here the facts below establish that the very fact of compliance by disclosure of banking records will itself constitute the initial violation.* (Emphasis added)

The decision of the Court of Appeals is, therefore, in conflict with all of the above applicable decisions of this Court.

5. *The State privilege statute is not in conflict with the United States Constitution or any Federal statute or any right granted by Federal statute.*

The United States Supreme Court, in *Stuart Machine Co. v. Davis*, 301 U.S. 548, and in *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495. 57 S. Ct. 868. and the Mississippi Supreme Court in *Tatum v. Wheeless*, 180 Miss. 800, 178 So. 95, upheld the constitutionality of the Mississippi Employment Security Law and similar laws of other states. In these cases, every conceivable constitutional question was raised and these laws were held to be constitutional in all respects. Therefore, the provision in the state statute forbidding disclosure of identifying information, except to the extent necessary for proper administration of the act, upon penalty of fine or imprisonment, is not in violation of the United States Constitution.

It is true that under Article VI, Section 2, of the United States Constitution a Federal law is supreme over a state law if the two laws are in conflict. We submit that this provision of the state law is not in confict with any Federal law.

It is not in conflict with Title VII of the Civil Rights

Act of 1964, and could not deprive any individual of rights protected by that Act. The only effect of the state statute is that in civil rights suits, or any other suits not related to the administration of the state act, parties must obtain their evidence elsewhere because the information obtained by MESC in the administration of the state act is privileged.

The United States Supreme Court, in *Hale v. Henkel*, 201 U.S. 43 (1906), at page 68, says:

> "The difficulty of maintaining a case upon the available evidence is a danger which the law does not recognize. *In prosecuting a case, or in setting up a defense, the law takes no account of the practical difficulty which either party may have in procuring his testimony.*" (Emphasis added)

Actually, the Civil Rights Act of 1964 recognizes and protects the provision of the state act which prohibits disclosure. Section 708 of the Civil Rights Act (Appendix A, p. 34) specifically provides that nothing in said act shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any state.

Also, this provision of the state act is not in conflict with, but is recognized and protected by, the Federal Rules of Civil Procedure wherein Rules 26, 34 and 45 require the production in discovery proceeding only of evidence "not privileged."

Therefore, this privilege provision in the state statute is no more in conflict with, and can no more be used to frustrate the implementation of any federally protected

rights, than any other privilege statute which merely limits evidence which is available to parties in their lawsuits.

6. *This Court has granted certiorari in many cases involving questions involved in this case.*

In *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Brownell*, App. D.C. 1958, 78 S. Ct. 1087, 357 U.S. 197, 2 L.Ed 2d 1255, the Court granted certiorari to review the question of whether or not a party could be required to produce information that might lead to imposition of criminal sanctions.

In *Hickman v. Taylor*, Pa. 1947, 67 S.Ct. 385, 329 U.S. 495, 91 L.Ed. 451, the Court granted certiorari to review a question of whether or not a party was entitled to access to certain statements or reports from counsel for other party.

In *Bates v. City of Little Rock*, Ark. 1960, 80 S. Ct. 412, 361 U.S. 516, 4 L.Ed. 2d 480 the Court granted certiorari to review the question as to whether compulsory disclosure of membership lists might be required.

In *Howard v. Lyons*, Mass. 1959, 79 S. Ct. 1331, 360 U.S. 593, 3 L.Ed. 2d 1454, the Court granted certiorari to consider question of whether the Court of Appeals erred in failing to recognize a privilege claimed by a party.

In *Killian v. United States*, Ill. 1961, 82 S. Ct. 302, 368 U.S. 231, 7 L.Ed. 2d 256, the Court granted certiorari to determine whether production of statements submitted by government informers might be required.

In *Ullmann v. United States*, N.Y. 1956, 76 S. Ct. 497, 350 U.S. 422, 100 L.Ed. 577, 53 A.L.R. 2d 1008, the Court granted certiorari to review the validity of a statute requiring the production of evidence without also providing absolute immunity.

In *Palermo v. United States*, N.Y. 1959, 79 S. Ct. 1217, 360 U.S. 343, 3 L.Ed. 2d 1287, the Court garnted certiorari to determine a party's right to the production of statements.

In *Shuttlesworth v. City of Birmingham, Ala.*, Ala. 1963, 83 S. Ct. 1130, 373 U.S. 262, 10 L.Ed. 335, the Court granted certiorari because of grave constitutional questions involved in the case.

In *Watkins v. United States*, App. D.C. 1957, 77 S. Ct. 1173, 354 U.S. 178, 1 L.Ed. 2d 1273, the Court granted certiorari because of important questions of constitutional law presented as to rights of witness.

In *Leiter Minerals, Inc. v. United States*, La. 1957, 77 S. Ct. 287, 352 U.S. 220, 1 L.Ed. 2d 267, the Court granted certiorari to review decision of Court of Appeals on important questions of federal-state relations.

WHEREFORE, the defendants-appellants pray the Court to issue writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review that Court's decision of August 18, 1970, in this cause.

Respectfully submitted,

ALBIOUN F. SUMMER
Attorney of Record for
Defendants-Appellants
Post Office Box 220
Jackson, Mississippi

H. L. HUTCHERSON
Attorney for Defendants-
Appellants
Post Office Box 1699
Jackson, Mississippi

WALTER R. BIVINS
Attorney for Defendants-
Appellants
Post Office Box 1699
Jackson, Mississippi

CERTIFICATE OF SERVICE

I hereby certify that I have served ~~two~~ three copies of the above and foregoing Petition for Writ of Certiorari by mailing ~~two~~ three copies of the same in the United States Mail, postage prepaid, this the 21 day of September, 1970, to the following; being all parties required to be served.

Honorable James Robertson and Roy Haber
Attorneys for Plaintiffs-Appellees
233 North Farish Street
Jackson, Mississippi 39201

Honorable Robert Patterson
Attorney for Defendant Monroe Manufacturing Co.
Aberdeen, Mississippi

ALBIOUN F. SUMMER,
Attorney for Defendants-
Appellants

APPENDIX A

Section 2(a), *Mississippi Employment Security Law* (Section 7369, Mississippi Code of 1942, Annotated):

"Declaration of State Public Policy.

"Section 2(a). As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state . Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

Section 11(g), *Mississippi Employment Security Law* (Sections 7411 and 7412, Mississippi Code of 1942, Annotated):

"(g) (1) Records and reports. Each employing unit shall keep true and accurate work records, containing such information as the commission may prescribe. Such records shall be open to inspection and be subject to being copied by the commission or its authorized representatives at any reasonable time and as often as may be necessary. The commission, Board of Review, and any referee may require from any employing unit any sworn or unsworn reports, with respect to persons employed by it, which they or any of them deem necessary for the effective administration of this act. In formation thus obtained, or obtained from any individual pursuant to the administration of this act shall, except to the extent necessary for the proper administration of this act, be held confidential and shall not be published or be opened to public inspection (other than to public employees in the performance of their public duties), in any manner revealing the individual's or employing unit's identity, but any claimant (or his legal representative) at a hearing before an Appeal Tribunal or the Board of Review shall be supplied with information from such records to the extent necessary for the proper presentation of his claim. Any employee or member of the Board of Review or any employee of the commission, who violates any provision of this section, shall be fined not less than twenty dollars ($20.00), nor more than two hundred dollars ($200.00), or imprisoned for not longer than ninety (90) days or both. The commission may make the State's records relating to the administration of this act available to the railroad retirement board, and may furnish the railroad retirement board, at the expense of such board, such copies thereof as the railroad retirement board deems necessary for its purposes. The commission may afford reasonable

cooperation with every agency of the United States charged with the administration of any unemployment insurance law.

"(2) Privileged communications. All letters, reports, communications, or any other matters, either oral or written, from the employer or employee to each other or to the commission or any of its agents, representatives or employees, which shall have been written, sent, delivered, or made in connection with the requirements and administration of this act, shall be absolutely privileged and shall not be made the subject matter or basis of any suit for slander or libel in any court of the State of Mississippii, unless the same be false in fact and maliciously written, sent, delivered, or made for the purpose of causing a denial of benefits under this act."

Section 12(a), *Mississippi Employment Security Law* (Section 7419, Mississippi Code of 1942, Annotated).

"State employment service. The Mississippi State Employment Service is hereby established in the Mississippi Employment Security Commission. The commission, in the conduct of such service, shall establish and maintain free public employment offices in such number and in such places as may be necessary for the proper administration of this act and for the purpose of forming such functions as are within the purview of the act of Congress entitled 'An act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system, and for other purposes,' approved June 6, 1933 (48 Stat. 113, U. S. Code, Title 29, Section 49 (C)), as amended. * * * "

Section 11f), *Mississippi Employment Security Law* (Section 7410, Mississippi Code of 1942, Annotated):

> "Promotion of employment. The commission with the advice and aid of its advisory councils, shall take all appropriate steps to reduce and prevent unemployment * * *."

Section 4(a), *Mississippi Employment Security Law* (Section 7378, Mississippi Code of 1942, Annotated):

> "Benefit Eligibility Conditions.
>
> Section 4. An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that:
>
> "(a) He has registered for work at and thereafter has continued to report to an employment office in accordance with such regulations as the commission may prescribe * * *."

Section 708, *Civil Rights Act of 1964* (42 U.S.C. Sec. 2000e-7):

> "Effect on State laws
>
> "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter."

Section 709(c), *Civil Rights Act of 1964* (42 U.S.C. Sec. 2000e-8):

"Except as provided in subsection (d) of this section, every employer, employment agency, and labor organization subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission may prescribe by regulation or order * * *."

Article 3, Section 26, *Mississippi Constitution* (Volume 1, Mississippi Code of 1942, Annotated):

"Sec. 26. In all criminal prosecutions the accused * * * shall not be compelled to give evidence against himself * * *."

Amendment V, *United States Constitution:*

"Constitution of the United States. Amentment V.

"No person shall * * * be compelled in any criminal case to be a witness against himself * * *."

1. Last Name | First | Middle

2. Number and Street Address, Route or P.O. Box No.

3. City | County of Residence | State

4. Give Directions to Your Home

5. Social Security No.

6. Telephone No.

7. Date of Birth — Mo. Day Year

8. ☐ Married ☐ Divorced ☐ Single ☐ Separated ☐ Widowed ____ No. Children

9. Height — Ft. In.

10. Weight — Pounds

11. CURRENT MILITARY STATUS

Retired ☐ National Guard ☐ Reserve ☐ Female Vet. ☐

Proof of Vet. Status ____ Period of Active Service: From ____ To ____

Type of Discharge ____ Draft Status ____

12. Do You Have: Automobile ____ Drivers License ____ Comm. ____ Reg. ____

13. UNION STATUS

Name ____ Local No. ____

14. EDUCATION

Circle Highest Year Completed

	Grade School	High School	College	Degree
	1 2 3 4 5 6 7 8	9 10 11 12	1 2 3 4 5 6	

School Last Attended: Name ____ Location ____ Year ____

15. Occupational Training (Typing, Shorthand, Electronics, etc.) Including Military Courses:

MSES-511 (Rev., 7-63)

APPLICATION CARD

Do not write below this line

16. A. Resume	B. Test.	C. [illegible]	D. Sel.Pl.	E. Couns.	F. J.D.	G. Clear.	H. Race

17. Occupational Title	Code

AVAILABILITY

18. Type Work Preferred:

19. Work Away From Home: Yes ☐ No ☐

20. Farm Work: Yes ☐ No ☐

21. Location Preferred:

22. Location Acceptable:

23. Minimum Salary Acceptable: Locally ____ Away From Home ____

24. Comments on Availability:

25. Date

FOR OFFICE USE ONLY

WORK HISTORY (show last employment first)

26. Name of Employer			32. Name Job and Describe Exactly What You Did and How You Did It
27. Address			
28. Employer's Business			
29. Length of Job	Date Ending	Pay	
30. Reason for Separation	31. If Working, May Employer Be Contacted: Yes ____ No ____		
33. Name of Employer			38. Name Job and Describe Exactly What You Did and How You Did It
34. Address			
35. Employer's Business			
36. Length of Job	Date Ending	Pay	
37. Reason for Separation			
39. Name of Employer			44. Name Job and Describe Exactly What You Did and How You Did It
40. Address			
41. Employer's Business			
42. Length of Job	Date Ending	Pay	
43. Reason for Separation			

45. **Summary of other work experience**

FOR LOCAL OFFICE USE ONLY

46. **Test Results**

Aptitude Scores	G	V	N	S	P	Q	K	F	M

Date Administered _____ 19__

All | None | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 | 32 | 33 | 34 | 35

Specific Aptitude	Score	Date	Proficiency	Score	Date

47. PC: S L M H V 2 3 4 5 6
MC: I O B 2 3 4 5 6 7
INT: 1 2 3 4 5 6 7 8 9 0
TEMP: 1 2 3 4 5 6 7 8 9 0 X Y
APT: G V N S P Q K F M E C
GED: 1 2 3 4 5 6 7

48. Disabil. Yes ☐ No ☐

49. Skills, Knowledge, and Abilities

50. Occupationally Significant Hobbies or Leisure Time Activities

51. Special Information and Comments Including Physical Capacities Appraisal

52. Self Prepared ☐ Initials of Int. _____

FOR LOCAL OFFICE USE ONLY

53. Services Rendered

Date	Call	Ref.	JD	Coun.	Test	Purpose - Employer & Job Title	Resul.	Remarks	Init.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

GROZELIA CARR, ET AL.,

Plaintiffs

versus

CONOCO PLASTICS, INC., ET AL.,

Defendants.

CIVIL ACTION
No. EC 6861-S

ORDER

On Wednesday, May 28, 1969, in the United States District Court at Oxford, Mississippi, defendant officers of Mississippi Employment Security Commsson, by their counsel, brought on for hearing their Motion for Ruling on Privileged Status of MESC Records. At the same time, plaintiffs, by their counsel, brought on for hearing their Motion for Production ,Inspection and Copying of Documents under Rule 34 of the Federal Rules of Civil Procedure. The Court treated the two motions together, it appearing that a ruling on defendants' motions alone would have been an advisory opinion. Upon considera-tion of oral argument and the brief of the MESC de-

fendants, and in accordance with the opinion rendered from the bench in open Court, the Court finds that the policy of non-disclosure of employment records declared by the Mississippi Employment Security Law (Mississippi Code Section 7411) is outwieghed in this case by the need of the plaintiffs for access to information in the files of MESC, that the disclosure of such otherwise privileged information is necessary for the just disposition of this cause, and that this Court has the power to order such disclosure.

It is therefore this 4th day of June 1969

ORDERED

1. That the Motion of Plaintiffs for Produtcion, Inspection and Copying of Documents is granted in part, and that the said MESC defendants shall make available to plaintiffs for inspection and copying the following records:

(a) Forms MSES-511 for all MESC Aberdeen applicants or registrants who were active in MESC files during any period from July 2, 1965 to date in which there was pending a "job order" or MSES-514 order form in behalf of defendant Conoco Plastics, Inc. or its predecessor, or if no such "job order" was active, then during any such period in which MESC Aberdeen was making referrals to the said Conoco Plastics, Inc., in accordance with its Job Development Program.

(b) Forms MSES-514 and MSES-330C filed under the name of or with respect to Conoco Plastics, Inc., or its predecessor, from July 2, 1965 until the present.

(c) All other documents (as the term "documents" is defined in plaintiffs' motion) in the possession, custody or control of the MESC defendants concerning, relative to or reflecting the following: (1) Manpower training programs, Prarie Vocational School and the Sheltered Workshop; (2) MESC Aberdeen's assistance of or relationship with any community organizations seeking employment for minority group members; (3) The nature of MESC Aberdeen's responsibility and authority, organization, and duties of its employees; (4) MESC Aberdeen's job development program; (5) The nature of the job classifications utilized by MESC Aberdeen and methods or procedures for assigning job classifications to applicants or registrants; (6) Any equal employment opportunity program of MESC; (7) Inquiries of or responsive to the Equal Employment Opportunity Commission relative to the subject matter of this action (exclusive, however, of any of the MSES Forms 511, 514, or 330C not covered by previous provisions of this Order).

2. The documents required by the foregoing provisions of this Order to be discovered to plaintiffs shall also be discovered to defendant Conoco Plastics, Inc.

3. Plaintiffs having withdrawn their request for the documents specified in paragraph 13 of their Motion, that request may be renewed at a later date without prejudice to any party herein.

4. The Court reserves ruling upon plaintiffs' request for MSES Forms 514 and 330C filed under the names or with respect to employers other than Conoco Plastics, Inc. Plaintiffs may renew their motion for production of those documents at a later date without prejudice to any party herein.

5. With respect to the MSES forms discoverable to plaintiffs under this order, MESC Aberdeen shall provide to plaintiffs a key or other explanation of abbreviations and symbols utilized in the preparation of those forms.

.....

UNITED STATES DISTRICT JUDGE

Prepared: .....

James Robertson
Counsel for Plaintiffs

Approved as to Form: .....

H. L. Hutcherson
Counsel for Defendants Aldridge and Wooten

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

GROZELIA CARR, ET AL.,

Plaintiffs

versus

CONOCO PLASTICS, INC., ET AL.,

Defendants

CIVIL ACTION

NO. EC 6861-S

MOTION FOR REHEARING ON PRIVILEGED STATUS OF MESC RECORDS

The Defendants John E. Aldridge, as Executive Director of the Mississippi Employment Security Commission (hereinafter referred to as MESC), and Marvin Wooten, as Manager of Monroe County office of MESC, move the Court for a rehearing and reconsideration of the Court's order rendered from the Bench in open Court on May 28, 1969, on the privileged status of MESC records for the purposes of this suit, for the following reasons:

1. The Court in its opinion rendered from the Bench on May 28, 1969, ordered the said Defendants Aldridge

and Wooten to produce for inspection and copying by the plaintiffs or their attorneys application cards, Form MSES 511, for all MESC Aberdeen applicants or registrants who were active in MESC files during any period from July 2, 1965, to date in which there was pending a job order in behalf of Defendant Conoco Plastics, Inc.

2. The Court in its said opinion also ordered the production of order forms, MSES 514, from Conoco Plastics, Inc., only, and the Court denied the plaintiffs' motion for the production of said order forms from other employers.

3. In studying the application cards and order forms ordered by the Court to be produced for inspection and copying, the Defendants Aldridge and Wooten have discovered that the entries on the application cards showing the names of employers to whom referred would in effect divulge the same privileged and confidential information which the employer orders from said other employers would have divulged. That is, the names and race of the applicants referred to said other employers and showing for each said applicant whether hired or not hired.

WHEREFORE, the Defendants Aldridge and Wooten move the Court to amend its order rendered from the Bench on May 28, 1969, so as to permit the Defendants Aldridge and Wooten to block out on said application cards the names of employers other than Defandant Conoco to whom the applicants were referred, and to block out the applicant's names and addresses. The application card would still show the date on which the referrals was made and whether the applicant was hired or not hired but would not show the name of the employer to whom the referral was made.

H. L. HUTCHERSON, Attorney for Defendants John E. Aldridge, as Executive Director of Mississippi Employment Security Commission; and Marvin Wooten, as Manager of Monroe County Office of the Mississippi Employment Security Commission
P. O. Box 1699
Jackson, Mississippi

NOTICE OF MOTION

TO: L. A. Aschenbrenner and Robert Fitzpatrick and James Robertson
233 North Farish Street, Jackson, Mississippi 39201
Attorneys for Plaintiffs

Please take notice, that the undersigned will bring the above motion on for hearing before this Court at the United States Courthouse, Aberdeen, Mississippi, on the 9th day of June, 1969, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

H. L. HUTCHERSON, Attorney for Defendants Aldridge and Wooten
P. O. Box 1699
Jackson, Mississippi

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

GROZELIA CARR, ET AL.,

Plaintiffs

versus

CONOCO PLASTICS, INC., ET AL.,

Defendants

CIVIL ACTION
NO. EC 6861-S

ORDER

On Wednesday, June 4, 1969, in the United States District Court at Aberdeen, Mississippi, defendant officers of Mississippi Employment Security Commission, by their counsel, brought on for hearing their Motion for Rehearing on Privileged Status of MESC Records, after appropriate waiver of notice by counsel for plaintiffs and counsel for defendant, Conoco Plastics, Inc. Upon consideration of defendants' motion and after oral argument by counsel and in accordance with the opinion rendered from the bench in open court, it is hereby

ORDERED:

1) That the motion for rehearing is granted.

2) That the prayer in that motion for amendment of this Court's ruling rendered in open court May 28, 1969, is denied.

3) That, upon consideration of the special characteristics and nature of the information that may be disclosed by the production of the documents heretofore ordered to be produced by the Mississippi Employment Security Commission defendants, there are hereby imposed upon plaintiffs, defendant Conoco Plastics, Inc., and their counsel, requirements for the protection of the information contained in MSES Form 511 as follows:

(a) The documents disclosed under this Court's production order and the information contained in them shall not be used in any matter or proceeding except this action.

(b) Plaintiffs and their counsel shall not make copies of any documents or copies of documents furnished them, may not show them or disclose their contents to any other person, except other lawyers or non-legal personnel under their control associated with them in the preparation or trial of this matter, and shall take all reasonable steps to keep such documents secure. In the event counsel for plaintiffs are furnished copies of the MSES Forms 511 covered by this order and desire to inspect the originals they may do so.

(c) Defendant Conoco Plastics, Inc., and its counsel may not make or receive copies of any MSES Forms 511, except as hereinafter provided, but they shall be entitled to inspect the original documents in the possession of MESC or copies of documents furnished to counsel for plaintiffs and shall be entitled to make notes therefrom.

Counsel for defendant Conoco Plastics, Inc., shall be entitled under this Court's ruling of May 28, 1969, to copy the individual application forms of any party to this action and documents or forms (other than MSES Form 511) to which the May 28 ruling applies. With respect to the MSES Forms 511 furnished to counsel for defendant Conoco Plastics, Inc., the provisions of subparagraph 3(b) of this order shall apply.

(d) Upon final disposition of this action, counsel for plaintiffs and for defendant Conoco Plastics, Inc., shall yield up to the Clerk of this Court all MSES Forms 511 furnished them and covered by this order. The Clerk shall deposit them in the Registry of this Court under seal, and they shall not be disclosed thereafter to any person except upon order of this Court.

SIGNED AND ENTERED this 4 day of June, 1969.

UNITED STATES DISTRICT JUDGE

APPROVED
as to form:

James Robertson, Counsel for Plaintiffs

H. L. Hutcherson, Counsel for Defendants
Aldridge and Wooten

Robert D. Patterson, Counsel for Defendant
Conoco Plastics, Inc.

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28397

GROZELLA CARR, FANNIE MOORE,
VERA WALKER, CODA M. FEARS,
MARY LESSIE EWING and ESTER STEGALL
Plaintiffs-Appellees,

versus

MONROE MANUFACTURING COMPANY,
Defendant,
JOHN E. ALDRIDGE and MARVIN WOOTEN,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Mississippi

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(August 18, 1970)

Before BROWN, Chief Judge, AINSWORTH and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: The plaintiffs are Negroes who brought a class action against the corporate defendant (now Conoco Plastics, Inc.) and against the individual defendants, as officers of the Mississippi Employment Security Commission (MESC), charging

Conoco with racial discrimination in employment and the individual state officers with racial discrimination in handling job applications and in job referrals and employment classification, all in violation of Tit. VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

It quickly became obvious to the parties that records of MESC would be among the most relevant evidence in the case. The MESC officials filed a motion in the District Court contending that under Section 7411,[1] Miss. Code of 1942, as amended, the MESC records in question were privileged and confidential and that any employee of the Commission who revealed them was subject to criminal prosecution. They moved the court to hold the records privileged, and to facilitate decisions plaintiffs filed a cross-motion for their production. The District Judge granted the cross-motion to produce, and subsequently entered various protective

---

[1] "Information . . . obtained from any individual pursuant to the administration of this act, shall, except to the extent necessary for the proper administration of this act, be held confidential and shall not be published or be opened to public inspection (other than to public employees in the performance of their public duties), in any manner revealing the individual's or employing unit's identity, but any claimant (or his legal representative) at a hearing before an Appeal Tribunal or the Board of Review shall be supplied with information from such records to the extent necessary for the proper presentation of his claim. Any employee or member of the Board of Review or any employee of the commission, who violates any provisions of this section, shall be fined not less than twenty dollars ($20.00), nor more than two hundred dollars ($200.00), or imprisoned for not longer than ninety (90) days, or both. . . . The commission may afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law."

Defendants also call our attention on this appeal to § 7412:

"All letters, reports, communications or any other matters, either oral or written, from the employer or employee to each other or to the commission or any of its agents, representatives or employees, which shall have been written, sent, delivered, or made in connection with the requirements and administration of this act, shall be absolutely privileged and shall not be made the subject matter or basis of any suit for slander or libel in any court of the State of Mississippi, unless the same be false in fact and maliciously written, sent, delivered, or made for the purpose of causing a denial of benefits under this act."

provisions but declined to allow the MESC officials to block out on work application cards the names and addresses of applicants for employment and of employers not parties to the suit. The MESC officers seek to appeal from this latter part of the order.

The District Judge declined to certify the question as an appealable interlocutory order under 28 U.S.C. § 1292(b). The MESC officers then filed this appeal as from an injunction under 28 U.S.C. § 1292(a). Plaintiffs moved to dismiss the appeal, and the motion was carried with the case.

We hold that the order was appealable as a final order. 28 U.S.C. § 1291. No provision of § 1292 allows this appeal.

> [T]he following district court orders, entered in aid of a pending civil action and whether directed to a party or non-party, . . . are interlocutory in character, and are non-appealable: an order directing or refusing to direct the issuance of a subpoena, or granting or denying a motion to vacate a subpoena; an order directing or refusing to direct a party or witness to testify or to produce documents in response to a subpoena or a notice; an order granting or denying a motion to suppress a deposition; an order directing or refusing to direct a party to permit inspection under Rule 34; an order requiring or refusing to require a party to submit to a physical examination under Rule 35. Nor is such interlocutory order appealable as an injunction.

6 Moore, Federal Practice, ¶ 54.16 at 147 (2d ed. 1966). As pointed out in *Cobbledick v. United States*, 309 U.S. 323, 84 L.Ed. 783 (1940), the requirements of a healthy legal system simply do not permit halting the orderly process of a case in midstream to review incidentally matters which cross the current of the litigation. The relief sought by plaintiffs is not an injunction — all orders of court are mandatory in the sense that they must be obeyed but not all orders of court are injunctions. 6 Moore, ¶ 54.07 at 46. Construing discovery orders as injunctive would do violence to the policies enunciated in *Cobbledick*. See, e.g., *Trecor, Inc. v. Premco Instruments, Inc.*, 395 F.2d 849 (5th Cir. 1968).

However, discovery orders may be appealable where a governmental privilege is asserted and the government is not a party to the suit. *Caswell v. Manhattan Fire & Marine Ins. Co.*, 399 F.2d 417 (5th Cir. 1968); *Overby v. United States Fidelity & Guaranty Co.*, 224 F.2d 158 (5th Cir. 1955). In such cases the asserted governmental interest may be "irretrievably breached" by disclosure, and the government has no remedy on appeal from a final judgment in the original action, even where the matter sought to be discovered is held by one of the parties on the government behalf. *Overby*, *supra*, at 162.

Applying these principles to this case, to the extent that the appellants asserted the protection of the privilege on their own behalf, denial of the privilege was not appealable in the absence of a finding of contempt or a final judgment. *Cobbledick*, *supra*. But to the extent that a colorable claim was properly alleged on behalf of the State of Mississippi, the order was appealable.

Governmental privilege is assertible only by the government affected. *United States v. Reynolds*, 345 U.S. 1, 7, 97 L.Ed. 727, 733 (1953).

> There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege. . . .

Id. at 7-8, 97 L.Ed. at 733. *Overby*, *supra*, at 162-63. The claim of privilege was lodged in part by Aldridge, who as MESC chairman administers the Mississippi State Employment Service. Therefore it was properly raised.

The trial court followed the *Overby* requirement of independent judicial examination of the appropriateness of the privilege. On this appeal, defendants suggest that the case by case approach to the privilege is inappropriate in that the Mississippi statutes grant an absolute privilege against disclosure of the employment records here sought.

We turn first to plaintiffs' suggestion that we narrow the statutes by construction. Plaintiffs maintain that § 7412[2] is inapplicable to a claim of testimonial privilege, and that § 7411, providing for confidentiality, would not be construed by the Mississippi courts to grant an absolute privilege for all communications to MESC. They argue persuasively that the privilege con-

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[2]See fn 1, *supra*.

templated by § 7412 is not a freedom from divulging confidential communications at all, but that the section refers instead to nonliability in slander actions for communications to MESC. Cf. *Montgomery Ward & Co. v. Harland*, 205 Miss. 380, 38 So.2d 771 (1949) (en banc). They cite cases from other jurisdictions interpreting statutes strikingly similar to § 7411 as posing no bar to discovery of otherwise confidential communications in connection with pending litigation of all sorts.[3]

We decline the invitation to divine how the Mississippi courts would construe the statutes.[4] Such a determination is uncessary to our decision, and is better left to the state courts.

We proceed to examine the role of the claimed state evidentiary privilege in this federal case.

The Mississippi statute, however construed, does not grant an absolute privilege from disclosure of MESC

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[3]Employment security records: Marcean v. Orange Realty, Inc., 97 N.H. 497, 92 A.2d 656 (1952); Powers ex rel Dept. of Employment Security v. Superior Court, 79 R.I. 63, 82 A.2d 885 (1951); social security (welfare) records: Jones v. Giannola, 252 S.W. 2d 660, 663 (Mo. Ct. App. 1952); State ex rel. State v. Church, 35 Wash. 2d 170, 211 P.2d 701 (1949); State ex rel. Haugland v. Smythe, 25 Wash. 2d 161, 170, 169 P.2d 706, 711 (1946); Bell v. Bankers Life & Cas. Co., 327 Ill. App. 321, 64 N.E. 2d 204 (1945). See generally 8 Wigmore, Evidence, § 2377 at 780-791 (McNaughton rev. 1961).

There is some indication in the record that MESC itself has not applied a rule of absolute privilege to its records. Counsel for the defendants, in discussing a request by plaintiffs for discovery subsequently denied by the trial court, stated:

> EEOC, under the Federal Act, has specific authority, and by written agreement which was entered into when the Civil Rights Act was first enacted, agreement with this agency, that the EEOC has access to any and all records of MESC relevant to a complaint or charge, relative to charges filed with EEOC.

[4]Not all cases deny the privilege. In Smith v. Illinois Valley Ice Cream Co., 20 Ill. App. 2d 312, 156 N.E.2d 361 (1959), unemployment compensation records and testimony as to their contents were both excluded at trial on the strength of a statute which clearly rendered them inadmissible.

records in this case. We have recently reviewed the relevant authorities in *Garner v. Wolfinbarger*, ... F.2d ..... [No. 26186, 5th Cir., Aug. ....., 1970] We there concluded that in any given instance the special federal interest in seeking the truth in a federal question case may require disclosure despite the existence of a state rule holding the same communications privileged. We reaffirm that result here.

Our conclusion is buttressed in this case by the policy of American courts noted above to weigh, independently of the evaluation of an executive officer, the need for any asserted governmental privilege. *United States v. Reynolds*, *supra*; 8 Wigmore, § 2379 at 808-17. *Reynolds* was a state secret case. Later cases have not confined the court's control over governmental privileges to assertions of the state secret privilege. In *Overby* the Comptroller of the Currency asserted that disclosure of reports of examination of national banks would make banks reluctant voluntarily to provide information and thereby undercut the Comptroller's ability to supervise them, an argument strikingly similar to that advanced by defendants here. This court cited *Reynolds* for the proposition that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 224 F.2d at 163.

State cases of governmental privilege seem to follow the same approach. *Stratford Factors v. New York State Banking Dept.*, 10 App. Div. 2d 66, 197 N.Y.S. 2d 375 (1960); *Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952).[5] The granting or withholding of any privi-

[5]Note also the approach of several state courts cited *supra*, fn 3, in narrowing state confidentiality statutes by construction so as to permit disclosure in court proceedings.

lege requires a balancing of competing policies, 8 Wigmore, § 2285 at 527-28. The claim of governmental privilege is no exception; in fact, the potential for misuse of government privilege, and the consequent diminution of information about government available to the public, is one more factor which strongly suggests the need for judicial arbitration of the availability of the privilege. That the need for discovery of communications with a state governmental agency arises in a federal case in no way diminishes the need for an independent weighing by the court of the policies behind the privilege."

Making even more compelling the need for judicial evaluation of the availability of the privilege is the fact that this is a suit against the highest official of the very government agency asserting the privilege. In such cases there is a special danger in the government official having the power to define the scope of his own privilege, free of supervision by the courts. As one pre-*Reynolds* court put it, in a similar suit:

> "Inasmuch as . . . the alleged actionable deviation from official conduct by the defendants is brought in issue by the answer . . ., it is eminently appropriate that all relevant documents which elucidate those vital issues . . . should not be withheld from the court. To rule

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"Deference to legislative judgment in this sensitive area does not require that a privilege be granted wherever a legislative policy favors confidentiality. For cases limiting such statutes by construction, see fn 3, *supra*. In *Overby* the Comptroller's claim of privilege rested on specific statutes, and on the general statutory authority for the protection of records by regulation, and the informers' privilege. This court did not distinguish among possible bases for the Comptroller's authority to claim the privilege. We read *Reynolds* to say that "in the final analysis, the court and not the executive officer is to determine the validity of the claim of privilege." 224 F.2d at 163.

> otherwise in the absence of controlling authority would do violence to the court's duty to search for the truth and would be inimical to the traditional concept of [discovery] . . .
>
> We conclude by holding that to sustain the assertion of privilege of concealment under the specific situation before the court would be tantamount to abdicating an inherent judicial function of determining the facts upon which the admissibility of evidence in a case depends.

Zimmerman v. Poindexter, 74 F. Supp. 933, 935, 936 (D. Hawaii 1947); *cf. Kentucky Tennessee Light & Power Co. v. Nashville Coal Co.*, 55 F. Supp. 65 (W.D. Ky. 1944).

Where a government asserts a privilege not existent in the common law, but based on unique considerations of government policy, the trial court properly should consider the assertion of privilege as part of the good cause requirement, balancing competing policies. *Mitchell v. Bass*, 252 F.2d 513 at 517 (8th Cir. 1958). A court of appeals may reverse for abuse of discretion. *Id.* at 518-19. Defendants ask us to second-guess the trial court and find that blocking out the names of nonparties on application cards would not significantly reduce the scope of plaintiff' discovery, and furthermore that revelation of those names would seriously compromise the effectiveness of MESC.

The trial court entered two orders relative to the privilege. The first denied, subject to later renewal of the motion, discovery of jobseeking records con-

cerned solely with nonparty employers. The same order granted discovery of various other MESC records, including application cards of all those referred to Conoco.[7] MESC, at a second hearing, requested through defendants' counsel that it be allowed to place tape on application cards over the names of all applicants referred to Conoco except named plaintiffs, and all employers except Conoco to whom referrals were made. The District Court declined to so limit its first order, but ordered instead extensive protective devices to assure that neither the original records nor copies would reach any nonparty, and that the parties and their counsel would use the records only for purposes of the instant litigation.

Counsel below, speaking on behalf of MESC, strenuously contended that the names of nonparties should have been blocked out because their identity was "not essential" (on appeal, "not relevant") to a trial on the issues. It was urged that even without specific names, the application cards would reveal any existing pattern of discrimination. And it was suggested that strict and complete freedom from disclosure[8] was necessary to promote the full candor necessary to an effective job referral system. With particular reference to employers, the fear was expressed that users of MESC might either forego its services or temper communications with it for fear that their words might one day reach the public eye.

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[7]The trial court specifically found that

"the policy of non-disclosure of employment records declared by the Mississippi Employment Security Law (Mississippi Code Section 7411) is outweighed in this case by the need of the plaintiffs for access to information in the files of MESC, [and] that the disclosure of such otherwise privileged information is necessary for the just disposition of this cause."

[8]Except in MESC administrative hearings, as provided by the statute.

The trial court was justified in finding these possible side effects were outweighed by the value of disclosure in this instance. The suit was brought as a class action; determination of the identity of the other members of the class to whom effective relief might be granted may be difficult or impossible unless applicants' names are available from the employment records.[9] Instances of or evidence of discriminatory job placement may be available through interviews with other unsuccessful applicants. The experience, in referrals to other employers, of applicants referred to Conoco may shed some light on whether MESC is engaging in overall discriminatory referral practices as alleged. The reasons favoring disclosure are especially compelling in light of the nature of the case. The trial court said from the bench:

> [I]n view of the stated policy of the law, that is, to eradicate racial discrimination, I believe the need for this information by the plaintiffs would overcome any benefits that would be derived by the people who furnished this information. . . .

The potential harm from disclosure of any communication subject to a privilege must be weighed aganist the benefits of disclosure. The possibility of harm to an administrative program and the invasion of privacy of persons who seek employment cannot be ignored. But in nearly every case involving similar state statutes, *supra* n. 3, the balance has been struck in favor of disclosure in court proceedings. In determining the

[9]Prior to August 1, 1967 MESC record did not reflect the race of applicants. In order to determine race and consequently the possibility of discrimination, plaintiffs may need to seek out individual applicants.

availability of privilege a court may properly consider the possibility of entering protective orders, and in this instance the District Court did so. We are of the opinion that the District Court, in balancing the competing interests, did not abuse its discretion.

As a corollary, a trial court is duty-bound, where it orders production of documents in which there were strong policy reasons against public disclosure, to limit the availability and use of those documents and their contents by carefully drawn protective provisions. See, e.g., *Bain & Blank, Inc. v. Bruno-New York, Inc.* 17 F.R.D. 346 (S.D.N.Y. 1955). The court below entered extensive protective orders circumscribing access to and copying and use of the documents The defendants state that some of the documents contain data concerning employment applicants, obtained in personal interviews and elsewhere, of a nature that would be embarrassing or denigrating to reveal — for example, physical or emotional handicaps, diseases disqualifying an applicant for certain employment, dissatisfaction with present employment. MESC can review its records and in any instance where such information appears can seek from the District Judge further protective orders that will give appropriate regard to the privacy and the dignity of the individuals affected.

AFFIRMED.

APPENDIX G

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 28397

D. C. Docket No. CA EC 6861-S
GROZELLA CARR, FANNIE MOORE,
VERA WALKER, CODA M. FEARS,
MARY LESSIE EWING and ESTER STEGALL
Plaintiffs-Appellees,

versus

MONROE MANUFACTURING COMPANY,
Defendant,
JOHN E. ALDRIGE and MARVIN WOOTEN,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Mississippi

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Before BROWN, Chief Judge, AINSWORTH and GODBOLD, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

the Northern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

August 18, 1970

Issued As Mandate: